

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE, *et al.*,

Defendants.

No. 2:18-cv-1115-RSL

**Brief of *Amicus Curiae*
Brady Center to Prevent Gun Violence
in Support of Plaintiffs'
Motion for Preliminary Injunction**

Note on Motion Calendar: August 24, 2018

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Interest of *Amicus Curiae*¹

2 The Brady Center to Prevent Gun Violence is a non-profit organization dedicated to
3 reducing gun violence through education, research, and legal advocacy. Its membership includes
4 individuals who are concerned with, and affected by, public health and safety issues stemming
5 from gun violence. The Brady Center has a substantial interest in ensuring that the Second
6 Amendment is not misinterpreted as a barrier to strong and effective government action to
7 prevent gun violence. The Brady Center has filed numerous briefs *amicus curiae* in cases
8 involving the constitutionality and interpretation of gun laws, including *District of Columbia v.*
9 *Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady
10 Center brief), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Abramski v. United States*, 134
11 S. Ct. 2259 (2014), and *Defense Distributed v. United States Dep't of State*, 838 F.3d 451, 461
12 (5th Cir. 2016). The Brady Center submits this *Amicus Curiae* brief in support of Plaintiffs'
13 position that the relief they seek is fully consistent with the Second Amendment.
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Background

17 The Brady Center respectfully refers the Court to the detailed factual allegations stated in
18 the First Amended Complaint. (Dkt. No. 29.)
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22 ¹ “In the absence of local rules governing the role of amicus curiae, the court will adhere to the
23 applicable rules found in the Federal Rules of Appellate Procedure.” *Microsoft Corp. v. United*
24 *States DOJ*, No. C16-0538JLR, 2016 WL 4506808, at *9 (W.D. Wash. Aug. 29, 2016); *see also*
25 *Skokomish Indian Tribe v. Goldmark*, No. C13-5071JLR, 2013 WL 5720053, at *2 (W.D. Wash.
Oct. 21, 2013) (“The court also chooses to adhere to other rules concerning amicus curiae found
in the Federal Rules of Appellate Procedure.”).

26 Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *Amicus Curiae* The
Brady Center to Prevent Gun Violence represents that no counsel for a party authored this brief
in whole or in part, and that neither a party, a party’s counsel, nor any other person made a
monetary contribution to preparing or submitting this brief.

1 **Argument**

2 **I. The Second Amendment does not provide Defense Distributed with the right to put**
3 **CAD files for 3D-printed firearms on the internet**

4 Plaintiffs' request for relief neither implicates nor violates the Second Amendment. (Dkt.
5 No. 29 at ¶ 11.) Defendant Defense Distributed ("DD") contends that the Second Amendment
6 secures the right to produce firearms and exchange technical data concerning firearms. (*See* Dkt.
7 No. 11-5 at ¶¶ 42-46.) But the Government does not regulate these activities through the
8 International Traffic in Arms Regulations (ITAR) or the U.S. Munitions List (USML). Rather, the
9 regulations at issue concern the export of technical data. The Second Amendment plainly does
10 not protect the export of technical data about defense articles, including CAD files that would
11 allow anyone with a 3D printer to create the parts and components of an operational firearm.
12

13 But even if the "production" of firearms or the "exchange" of technical data about
14 firearms were somehow affected by the regulations at issue, neither the plain language of the
15 Second Amendment nor U.S. Supreme Court jurisprudence supports DD's contention that those
16 activities are protected by the Second Amendment.

17 **A. The Second Amendment's guarantee does not extend beyond the possession**
18 **of a handgun in the home for self-defense by law-abiding citizens**

19 In the seminal case of *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme
20 Court considered the constitutionality of the District of Columbia's prohibition on the possession
21 of handguns in the home. Concluding that the core Second Amendment guarantee provided an
22 individual right of "law-abiding, responsible citizens to use arms in defense of hearth and home,"
23 the Court struck down the District of Columbia's ban on handgun possession as an impermissible
24 infringement on the core Second Amendment right. *Id.* at 629, 635 ("[f]ew laws in the history of
25 our Nation have come close to the severe restriction of the District's handgun ban.").

1 Justice Scalia’s majority opinion went out of its way to explain that a wide array of
2 “longstanding prohibitions” on firearms laws remain lawful. *Id.* at 626-27. A fair reading of the
3 decision is that the Court’s holding is limited to possession of a traditional handgun for self-
4 defense purposes in the home. Indeed, the Court denied certiorari in *Friedman v. City of*
5 *Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015), where
6 the Seventh Circuit held that a categorical ban on “assault weapons” and large capacity
7 magazines fell outside the scope of the Second Amendment because the ordinance “leaves
8 residents with many self-defense options,” including handguns. *Id.* at 411.

10 **B. Second Amendment analytical framework**

11 The Ninth Circuit, in light of *Heller*, has held that “[T]he Second Amendment has ‘the
12 core lawful purpose of self-defense’ and ‘elevates above all other interests the right of law-
13 abiding, responsible citizens to use arms in defense of hearth and home.’” *Fyock v. Sunnyvale*,
14 779 F.3d 991, 996 (9th Cir. 2015) (quoting *Heller*, 554 U.S. at 630, 635). “To evaluate post-
15 *Heller* Second Amendment claims, the Ninth Circuit, consistent with the majority of our sister
16 circuits, employs a two-prong test: (1) the court ‘asks whether the challenged law burdens
17 conduct protected by the Second Amendment’; and (2) if so, what level of scrutiny should be
18 applied.” *Id.* (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

20 In *Fyock*, the city of Sunnyvale, California outlawed high-capacity magazines. Plaintiffs
21 sued and sought an injunction based on an alleged infringement of Plaintiffs’ Second
22 Amendment rights. The district court held that high-capacity magazines “are hardly central to
23 self-defense,” and “the right to possess magazines having a capacity to accept more than ten
24 rounds lies on the periphery of the Second Amendment right” *Id.* The district court
25 nonetheless held that the ban on high-capacity magazines burdened conduct protected by the
26 Second Amendment because “the Sunnyvale ordinance prohibits average, law-abiding citizens

1 from possessing protected arms that are not dangerous and unusual.” *Id.* at 1277. The court held
2 that intermediate scrutiny was appropriate, and denied Plaintiffs’ request for a preliminary
3 injunction, finding that the ordinance “is reasonably tailored to the asserted objective of
4 protecting the public from gun violence.” *Id.* at 1279, 1281.

5 On appeal, the Ninth Circuit affirmed, holding: “The district court correctly recognized
6 that to determine the appropriate level of scrutiny, the court must consider (1) how closely the
7 law comes to the core of the Second Amendment right; and (2) how severely, if at all, the law
8 burdens that right.” *Fyock*, 779 F.3d at 998 (citing *Chovan*, 735 F.3d at 1138). The Ninth Circuit
9 also affirmed the district court’s application of intermediate scrutiny, because Sunnyvale’s stated
10 objective in passing the ordinance was “significant, substantial, or important,” and Sunnyvale
11 “demonstrated a reasonable fit between the challenged regulation and the asserted objective.” *Id.*
12 at 1000.²
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16 ² The Fifth Circuit, which controls in *Defense Distributed v. U.S. Department of State*, No. 1-15-
17 cv-372 RP (W.D. Tex.), applies the same analysis as the Ninth Circuit. In *National Rifle*
18 *Association v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir.
2012) (“*NRA*”), the Fifth Circuit upheld provisions of the Omnibus Crime Control and Safe
Streets Act of 1968, which placed restrictions on firearm purchases by 18 to 20 year-olds.

19 In so doing, the Court adopted a two-step framework for analyzing a Second Amendment claim:
20 First, courts must analyze “whether the conduct at issue falls within the scope of the Second
21 Amendment right. . . . To determine whether a law impinges on the Second Amendment right,
22 we look to whether the law harmonizes with the historical traditions associated with the Second
Amendment guarantee.” The Court held that “a longstanding, presumptively lawful regulatory
measure . . . would likely fall outside the ambit of the Second Amendment; that is, such a
measure would likely be upheld at step one of our framework.” *Id.* at 196.

23 Second, if the conduct at issue falls within the scope of the Second Amendment, the Court must
24 determine whether to apply strict or intermediate scrutiny. *Id.* at 195. Strict scrutiny is
25 appropriate where the conduct threatens a “core” Second Amendment right—that is, “the right of
26 a law-abiding, responsible adult to possess and use a handgun to defend his or her home and
family.” *Id.* Conduct that does not affect the core Second Amendment concern of self-defense
within the home only warrants intermediate scrutiny. *Id.* Under intermediate scrutiny, the
government need only “demonstrate a ‘reasonable fit’ between the challenged regulation and an
‘important’ government objective.” *Id.*

1 **C. Under *Heller* and *Fyock*, both the manufacture of firearms and the**
2 **dissemination of technical data about firearms fall outside the scope of the**
3 **Second Amendment**

4 Considering “the normal and ordinary” meaning of the words “keep and bear” in the
5 Second Amendment text, and excluding a “secret or technical meaning” of the text as Justice
6 Scalia instructed in *Heller*, it is apparent that the Second Amendment does not provide a right to
7 “manufacture,” “make,” or “produce” a firearm, or to “exchange,” “transfer,” or “disseminate”
8 technical data about firearms—let alone “export” a computer file used to “automatically”
9 manufacture firearms. Thus, the Court need not even reach the second prong of the test applied
10 in *Fyock*, because the conduct challenged by DD falls outside the scope of the Second
11 Amendment under a plain language analysis.

12 The “right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626.
13 If anything, a regulation affecting the export of firearms or technical data that could be used to
14 produce firearms (or firearm components) is a “longstanding, presumptively lawful regulatory
15 measure” that easily passes constitutional muster. Indeed, Justice Scalia noted in *Heller* that the
16 Court’s opinion should not “be taken to cast doubt on longstanding prohibitions on the
17 possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms
18 in sensitive places such as schools and government buildings, or **laws imposing conditions and**
19 **qualifications on the commercial sale of arms.**” *Id.* at 626-27 (emphasis added).
20

21 Both the commercial sale and the manufacture of firearms have a longstanding history of
22 regulation in the United States. For instance, the Omnibus Crime Control and Safe Streets Act of
23 1968 prohibits a person from “engag[ing] in the business of importing, manufacturing, or dealing
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1 in firearms,” unless a person is a “licensed importer, licensed manufacturer, or licensed dealer.”
2 18 U.S.C. § 922(a)(1)(A).³

3 The National Firearms Act of 1934, as amended by the Gun Control Act of 1968, requires
4 that “[e]ach manufacturer, importer, and maker [of firearms] shall register each firearm he
5 manufactures, imports, or makes.” 26 U.S.C. § 5841(b). The Act also provides:

7 No person shall make a firearm unless he has (a) filed with the
8 Secretary a written application, in duplicate, to make and register
9 the firearm on the form prescribed by the Secretary; (b) paid any tax
10 payable on the making and such payment is evidenced by the proper
11 stamp affixed to the original application form; (c) identified the
12 firearm to be made in the application form in such manner as the
13 Secretary may by regulations prescribe; (d) identified himself in the
14 application form in such manner as the Secretary may by regulations
15 prescribe, except that, if such person is an individual, the
16 identification must include his fingerprints and his photograph; and
17 (e) obtained the approval of the Secretary to make and register the
18 firearm and the application form shows such approval. Applications
19 shall be denied if the making or possession of the firearm would
20 place the person making the firearm in violation of law.

21 26 U.S.C. § 5822.

22 If accepted, DD’s contention that the manufacture of firearms somehow falls within the
23 scope of the Second Amendment would eviscerate the longstanding regulatory scheme requiring
24 the registration of firearms, and for firearms manufacturers to apply for, and receive, a license to

25 ³ See *United States v. Mazzaella*, 614 F.3d 85, 94-95, 98-99 (3d Cir. 2010) (affirming
26 defendant’s conviction under 18 U.S.C. § 922(k) for possession of a handgun with an obliterated
serial number, and holding that “there is no categorical [Second Amendment] protection for
unmarked firearms,” that there is “no compelling reason why a law-abiding citizen would prefer
an unmarked firearm,” and that Section 922(k) passed both intermediate and strict scrutiny, in
part because the statute “reaches only conduct creating a substantial risk of rendering a firearm
untraceable,” and “does not limit the possession of any class of firearms”); *United States v.*
Fincher, 538 F.3d 868, 874 (8th Cir. 2008) (holding that defendant’s possession of a machine
gun and a short-barreled shotgun are not protected by the Second Amendment, and noting that
defendant “has not directly attacked the federal registration requirements on firearms, and we
doubt that any such attack would succeed in light of *Heller*”).

1 conduct the business of manufacturing arms. Indeed, DD’s goal of spreading the availability of
2 computer files capable of producing 3D-printed firearms would undermine the important
3 objectives of the Omnibus Crime Control and Safe Streets Act, the National Firearms Act, and
4 the Gun Control Act.

5
6 **II. 3D-printed firearms are neither in “common use” nor “typically possessed by law-abiding citizens,” and thus, are not entitled to Second Amendment protection**

7 The federal law and regulations at issue do not affect domestic concerns of firearm
8 possession. But even if they did, regulations affecting the 3D-printed firearms that can be
9 manufactured using DD’s “technical data” also pass constitutional muster because 3D-printed
10 firearms *themselves* are not entitled to Second Amendment protection. In *Heller*, the U.S.
11 Supreme Court held that the Second Amendment only protects “the sorts of weapons” that are
12 “in common use” (*Heller*, 554 U.S. at 627) and weapons that are “typically possessed by law-
13 abiding citizens for lawful purposes” (*id.* at 625). See *N.Y. State Rifle & Pistol Ass’n, Inc. v.*
14 *Cuomo*, 804 F.3d 242 (2d Cir. 2015). Because 3D-printed firearms are neither in common use nor
15 typically possessed by law-abiding citizens for lawful purposes, 3D-printed firearms are not
16 entitled to Second Amendment protection.

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18 Reinforcing that the Second Amendment does not imbue an individual right to own or
19 possess weapons “not typically possessed by law-abiding citizens for lawful purposes,” the Ninth
20 Circuit has stated that “dangerous and unusual weapons” uniformly escape Second Amendment
21 protection of the Second Amendment. *Id.* at 996–97 (citing *United States v. Henry*, 688 F.3d 637,
22 640 (9th Cir. 2012) (“machine guns are ‘dangerous and unusual’ weapons”)). Further, where the
23 possession, or even ease of purchase, of typical, legally-obtained handguns are not impacted by a
24 government conduct, Ninth Circuit courts will not stand in the way of public safety restrictions
25 on the manufacture or distribution of fire arms. See *Pena v. Lindley*, 15-15449, 2018 WL
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1 3673149, at *6 (9th Cir. Aug. 3, 2018) (holding that no Second Amendment violation occurred
2 where plaintiff was able to “buy an operable handgun suitable for self-defense—just not the
3 exact gun they want”).

4 In *N.Y. State Rifle and Pistol Association*, the Second Circuit considered a challenge to
5 restrictions on the possession of “assault weapons” in Connecticut and New York enacted
6 following the December 14, 2012 mass murder of twenty first-graders and six adults at Sandy
7 Hook Elementary School in Newtown, Connecticut. The Second Circuit adopted virtually the
8 same two-part test that the Fifth Circuit set forth in *NRA*, applied intermediate scrutiny, and
9 upheld nearly all aspects of the laws at issue. *Cf. Friedman*, 784 F.3d 406 (upholding categorical
10 ban on assault weapons).
11

12 Unlike the assault weapons addressed in *N.Y. State Rifle and Pistol Association*, of which
13 there are “millions” in the United States, 3D-printed firearms are not commonly used by the
14 American public. And the greatest potential use for 3D-printed firearms—which can be virtually
15 undetectable—is to aid criminal and terrorist activities, not lawful purposes such as self-defense
16 or hunting. Even among law-abiding citizens, 3D-printed firearms are undisputedly “unusual”—
17 and if 3D-printed firearms are made widely available to criminals and terrorists, 3D-printed
18 firearms will also pose a grave danger to the public.
19

20 In sum, there is no Second Amendment right either to exchange technical data concerning
21 firearms or to manufacture firearms—and there certainly is no Second Amendment right to
22 export firearms or technical data about firearms. And, 3D-printed firearms are not entitled to any
23 Second Amendment protection because they are neither “in common use” nor “typically
24 possessed by law-abiding citizens.” To the extent that the regulations at issue burden DD’s
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1 Second Amendment rights, as the District Court correctly held, only intermediate scrutiny is
2 warranted, and the regulations at issue easily survive intermediate scrutiny.

3 **III. The Undetectable Firearms Act does not address Plaintiffs’ legitimate concerns for**
4 **public safety and national security**

5 To the extent DD argues that Plaintiffs’ public safety concerns about untraceable and
6 undetectable plastic 3D printable weapons are mollified by the Undetectable Firearms Act, 18
7 U.S.C. §922(p) (the “UFA”), the argument is plainly incorrect.⁴ For one, the UFA does nothing to
8 prevent guns from being supplied to felons and other prohibited persons. Further, it is far from
9 clear that the UFA covers 3D printed weapons.⁵

10
11 The UFA was enacted on November 10, 1988, “to prohibit certain firearms especially
12 useful to terrorists,” in response to growing concerns for ““the threat posed by firearms which
13 could avoid detection at security checkpoints[.]”” including at ““*airports, government buildings,*
14 *prisons, courthouses, [and] the White House.*”” *See United States v. Lopez*, 2 F.3d 1342, 1357
15 (5th Cir. 1993) (*aff’d on other grounds, United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624
16 (1995)) (citing H.R. Rep. 100-612, 1988 U.S.C.C.A.N. 5359) (emphasis added). Subject to
17 certain exemptions, the UFA makes it illegal to “manufacture, import, sell, ship, deliver, possess,
18 transfer, or receive any firearm” that “is not detectable” by a metal detector or which would not
19 “depict[]” the shape of a weapon to an X-ray scanner, and requires the equivalent of 3.7 ounces
20 of metal to be installed into all firearms for detection purposes. *See* 18 U.S.C.S. § 922(p)(1)-
21 (2)(C)(1).
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24 ⁴ No court has ever held that the UFA implicates a right guaranteed by the Second Amendment.

25 ⁵ The House Judiciary Committee observed that at the time the UFA was enacted, “[n]o firearms
26 currently manufactured in the United States [were] known to be subject to the proposed
prohibitions.” *See* H.R. Rep. 100-612, 6, 1988 U.S.C.C.A.N. 5359, 5363. The act was last
renewed in 2003. *See Undetectable Firearms Act Extension*, 108 P.L. 174, 117 Stat. 2481,
(2003).

1 In passing the UFA, The House Judiciary Committee conceded the Act's practical
2 limitations in that it "cannot assure that operators [of x-ray and metal detectors] will detect or
3 identify the firearm." H.R. Rep. 100-612, 5, 1988 U.S.C.C.A.N. 5359, 5362. And more recently,
4 former Congressman Steve Israel, who advocated for a revamp of the UFA to account for 3D-
5 printed plastic weapons, explained the reality that "[s]ecurity checkpoints, background checks,
6 and gun regulations will do little good if criminals can print plastic firearms at home and bring
7 those firearms through metal detectors with no one the wiser." See Andy Greenberg, *Meet The*
8 *"Liberator": Test-Firing The World's First Fully 3D-Printed Gun*, Forbes, May 5, 2013.

10 DD's CAD files will make it easier than ever for those who wish to do harm to
11 circumvent detection at security checkpoints, and accordingly, wholly undermine the UFA. For
12 instance, the design for the "Liberator," a 3D-printed plastic handgun promoted by DD, uses "a
13 steel nail to serve as the firing pin" and calls for a "six-ounce piece of steel that's included solely
14 to enable metal detectors to spot the guns (which keeps the weapons from running afoul of the
15 [UFA])." See Marrian Zhou, *The 3D-printed gun controversy: Everything you need to know*,
16 CNET, Aug. 3, 2018, [https://www.cnet.com/news/the-3d-printed-gun-controversy-everything-](https://www.cnet.com/news/the-3d-printed-gun-controversy-everything-you-need-to-know)
17 [you-need-to-know](https://www.cnet.com/news/the-3d-printed-gun-controversy-everything-you-need-to-know). However, these design elements can easily be bypassed, because "it is up to
18 the person doing the printing to comply." Ansel Halliburton, *The Constitution And The 3D*
19 *Printed Plastic Pistol*, TechCrunch, May 16, 2013, [https://techcrunch.com/2013/05/15/the-](https://techcrunch.com/2013/05/15/the-constitution-and-the-3d-printed-plastic-pistol)
20 [constitution-and-the-3d-printed-plastic-pistol](https://techcrunch.com/2013/05/15/the-constitution-and-the-3d-printed-plastic-pistol). "[A]s long as you stash the firing pin and the small
21 piece of steel elsewhere, you can carry the gun and walk right through airport security
22 checkpoints." Zhou, *supra*.

25 Accordingly, the UFA does nothing to offset Plaintiffs' "clear and reasonable fear," in
26 light of the Settlement Agreement, "that the proliferation of untraceable, undetectable weapons

1 will enable convicted felons, domestic abusers, the mentally ill, and others who should not have
2 access to firearms to acquire and use them.” *See State v. United States Dep’t of State*, No. C18-
3 1115RSL, 2018 WL 3629632, at *3 (W.D. Wash. July 31, 2018).

4 **Conclusion**

5 The relief sought by Plaintiffs should be granted.
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this day I caused to be electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system which will send notification of the filing to the
4 following:

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